Supreme Court, U.S.
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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY P. L. TIBBETTS,
Petitioner

v.

JAMES DITTES, ET. AL.
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Does the failure to furnish notice requirements for pro-se-to-counsel appeals in the Local Rules of the U.S. Court of Appeals for the Second Circuit violate the Due Process Clause of the Fifth Amendment of the U.S. Constitution?

2. Does the failure to furnish notice requirements for pro se-to-counseled appeals in the Local Rules of the U.S. Court of Appeals for the Second Circuit violate the Equal Protection Clause of the Fifth Amendment, 28 U.S.C. § 2072 and Rule 47 of the Federal Rules of Appellate Procedure?

3. Where the U.S. Court of Appeals for the Second Circuit fails to furnish notice requirements for the adjudication of pro-se-to-counseled appeals, is the extraordinary writ of mandamus warranted to compel constitutionally sufficient notice?

4. Where the Second Circuit dismissed a pro se-to-counseled appeal without any published notice requirements, was FRAP 47 the controlling law, which requires that "no sanction" be "imposed" unless the alleged violator "has been furnished" with "actual notice of the requirement"?

5. Where a default was entered because of constitutionally insufficient notice requirements in the Second Circuit Local Rules, is the "remedy" for this due process violation to "set aside" the judgment and "wipe the slate clean"?

6. Where a single circuit judge "dismiss[ed]" and "determine[d]" an appeal, while it was pending before a over a substantive issue, is that single-judge order (a) "void" for violating the three-judge panel rule under FRAP 27(c)? (b) does that order invoke the 'law-of-the-case doctrine'? and (c) is that order binding upon a subsequent merit panel reviews?

7. Where the Second Circuit entered a default judgment without furnishing any published notice requirements, does the Due Process Clause of the Fifth Amendment prohibit an application of *res judicata* to Rule 60(b) challenges over this infirmity?

8. Can the Clerk of the Court authorize a court employee (deputy clerk) to "dismiss" or "determine" an appeal, and, if so, what procedural safeguards must be employed to ensure the appeal is dismissed in accordance with the Due Process Clause of the Fifth Amendment?

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Second Circuit.

Petitioner, Jeffrey P. L. Tibbetts, is a citizen of the Commonwealth of Virginia.

Respondents James Dittes, Dwayne Huebner, Thomas Ogletree, James Garrett, Harry Adams, Penelope Laurens, Detra MacDougall, and Yale University, are individual and corporate respondents, located or residing in New Haven, Connecticut.

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CITATION OF OPINIONS BELOW

This Petition seeks review of the Motion to Recall the Mandate for Due Process Violations in *Tibbetts v. Dittes* (01-7377). A single circuit judge denied the motion on December 19, 2008. The opinion is reprinted in the Appendix to the Petition ("Pet. App.") at 1a 5-7.

JURISDICTIONAL STATEMENT

The Court's jurisdiction is invoked pursuant to Article III of the Constitution, 28 U.S.C. § 1254(1), and 28 USC § 2071. The judgment from the U.S. Court of Appeals for the Second Circuit was entered on December 19, 2008.

On the date of this decision, Petitioner was on active military duty. Petitioner's active-duty service included training and overseas mobilization in support of Operation Iraqi Freedom, from October

18, 2008 to June 6, 2010. A copy of Petitioner's official DD Form 214 is attached at Appendix O.

Under the provisions of the Servicemembers' Civil Relief Act (SCRA), Petitioner's active duty service is tolled under 50 U.S.C. § 522. Accordingly, the present petition was filed on 3 September 2010, within 90 days of the tolled date of June 6, 2010, and is timely pursuant to 28 U.S.C. § 1257 and Rule 10(1)(c) of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition involves the Due Process Clause of the Fifth Amendment. The petition also involves 28 USC § 2071 (Rules Enabling Act), FRAP 27(c) (Power of a Single Judge to Entertain a Motion), and FRAP 47 (Notice Requirements in Local Rules). The pertinent sections of these provisions and statutes are reproduced in the Appendix at Pet. App. 1a 1-4.

I. STATEMENT OF THE CASE

INTRODUCTION

In 1975, Congress directed the United States Courts of Appeals to implement local rules of practice and procedure, pursuant to 28 U.S.C. § 2071. Congress vested the Supreme Court with supervisory authority to ensure the courts' local rules did not "abridge, enlarge or modify any substantive right," and that they remain "consistent with Acts of Congress." 28 U.S.C. § 2072.

Shortly thereafter, thirteen federal circuit courts promulgated local rules and practices. The U.S. Court of Appeals for the Second Circuit, for its part, implemented the Second Circuit Local Rules ("Local Rules"), the Civil Appeals Management Plan ("CAMP") and pre-docketing Forms C and D. The implementation of these Local Rules were intended to further the scope of the Federal Rules of Appellate

Procedure ("FRAP") and to assist the busy docketing requirements of the Second Circuit Clerk's Office.

In 2007, the Second Circuit had 8,533 appeals (6,334 counseled appeals and 2,199 pro se appeals). In the course of pro se appeals, if an appellant retains counsel *after* the appeal is docketed, the Clerk's Office will administratively effect a "status transfer" from a 'pro se appeal' to a 'counseled appeal' (hereinafter "pro se-to-counseled" appeals). In 2007, the Second Circuit had 116 pro se-to-counseled appeals.[1]

Pro se-to-counseled appeals exist in varying degrees in all federal and state circuit courts.[2] Eleven federal circuits utilize post-docketing forms to

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[1] Statistic from the Second Circuit Executive Office.

[2] In the Second Circuit, civil and criminal counseled appeals constitute the largest appellate category with 74% of the total filings, pro se appeals at 25%, and pro se-to-counseled appeals at approximately 1%.

conduct the adjudication of these appeals. Post docketing means all forms to adjudicate the appeal are required after the appeal is docketed in the circuit court.

The Second Circuit, however, relies upon *pre-docketing* forms (namely Forms C and D), which must be filed *before* the appeal is docketed. The Second Circuit's emphasis on *pre-docketing* forms becomes inherently problematic in pro se-to-counseled appeals because there are no "notice" guidelines furnished in the Second Circuit Local Rules. This "notice" vacuum rises to the level of a constitutional magnitude where, as here, the Second Circuit dismissed a pro se-to-counseled appeal without furnishing any constitutionally sufficient "notice" requirements.

In January 2010 the Second Circuit amended and revised its Local Rules, in accordance with 28

U.S.C. § 2071, but neglected to implement or furnish any notice requirements for the adjudication of pro se-to-counseled appeals. Based on this recent revision to the Local Rules, it is apparent that the Second Circuit does not intend to furnish notice requirements as to how the use of these pre-docketing forms apply to this smallest category of appellate adjudication(s).

This Petition for Certiorari provides a test case for whether the Second Circuit furnishes constitutionally sufficient "notice" requirements for the adjudication of pro se-to-counseled appeals. If it is true that "notice" information is not furnished in the Local Rules for this appellate category, then the Second Circuit's ongoing adjudication, and occasional dismissal, of pro se-to-counseled appeals violates the Due Process and Equal Protection Clauses of the Fifth Amendment of the U.S. Constitution.

II. COURSE OF PROCEEDINGS

A. Appeal Dismissed Without "Notice" Requirements

On March 29, 2001, Petitioner appealed the judgment in *Tibbetts v. Dittes* (05-00995 CV) from the U.S. District Court for the District of Connecticut to the U.S. Court of Appeals for the Second Circuit. Pet. App. at 1a 9-11. Petitioner did not have legal representation at the time, thus, he filed pro se. The Clerk's Office docketed this pro se appeal as *Tibbetts v. Dittes* (01-7377) (hereinafter "*Dittes*").

In the Second Circuit's adjudication of pro se appeals, "[t]he requirement for filing pre-argument statements (forms C . . . and D) is waived." App. B, *infra* at 1. In counseled appeals, Forms C[3] and D[4]

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[3] *See* Form C (Pre-Argument Statement), App. C *infra* at 1.

[4] *See* Form D (Transcript Information), App. D *infra* at 1

must be filed within ten (10) days of the "Notice of Appeal."[5]

Ten months after *Dittes* was docketed, on March 29, 2002, Petitioner retained counsel. Petitioner's new counsel (John Nugent) was unable to locate any guidelines in the Second Circuit publications regarding how to administratively *transfer* a pro se appeal to a counseled appeal. Upon contacting the Second Circuit Clerk's Office ("Clerk's Office"), he was instructed to file a "notice of appearance" and await the issuance of a revised scheduling order. The Clerk's Office did not instruct him to file Forms C and D. Shortly thereafter, on April 2, 2001, the Clerk's Office sent Mr. Nugent a "Civil Case Package," which contained seven official publications for the Second Circuit. Notably absent

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[5] The Second Circuit revised its ten (10) day filing requirement to fourteen days in the 2010 Revised Local Rules.

in this "Civil Case Package" was any requirement that counsel file Forms C and D in pro se appeals.[6]

When the Clerk's Office failed to issue the scheduling order, on June 13, 2003, Appellees moved to dismiss the appeal on the grounds that new counsel had failed to file Forms C and D. Appellees cited no local rules in support of this position. In response thereto, Petitioner's counsel affirmed by affidavit that he had done everything instructed of him by the Clerk's Office: He filed his "notice of appearance," and he was awaiting issuance of the new scheduling order, as instructed.

On September 9, 2003, the Clerk's Office *sua sponte* dismissed *Dittes* for *failure to file Forms C*

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6 "Civil Case Package" is contained in the record below.

and D. The dismissal mandate was signed by Deputy Clerk, Tammy Martinez.[7]

It stated as follows:

> The Civil Appeal Management Plan of this Court Directs that within the (10) days after filing a Notice of Appeal, the Appellant shall file and serve a Pre-Argument Statement (FORM C), order a transcript of the proceedings from the court reporter and file and serve a statement concerning same (FORM D), pay docketing fee, and, that in the event of default of any of these requirements, the Clerk may dismiss the appeal without further notice. The appellant herein not having so proceeded, upon consideration thereof, it is ordered that the appeal from the order of 3/22/01 United States District Court for the District of Connecticut New Haven be and it hereby is dismissed. [App. E, *infra* at 1].

The Deputy Clerk used the *wrong* mandate to dismiss *Dittes*. The mandate was defective for at least three reasons:

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[7] There is no evidence the Clerk, Roseanne McKechnie, reviewed or approved this *sua sponte* dismissal by the deputy clerk. On its face, the dismissal *only* confirms that a deputy clerk had "authority" to dismiss the appeal, on behalf of the Clerk of the Court.

1. This mandate only applies to "counseled" appeals filed at the district court level. As already noted above, at the time of this filing and docketing, *Dittes* was *not* a counseled appeal; it was a pro se appeal. The Second Circuit had "waived" the requirement for filing Forms C and D in *Dittes*. Thereafter, the Second Circuit does not provide any published notice that counsel in a pro se appeals must file Forms C and D, which were already "waived." Without "notice" that counsel must *retroactively* file Forms C and D (to the date of the Notice of Appeal in the district court) the above mandate used to dismiss *Dittes* was inapplicable and inconsistent with the pre-docketing requirements in the Local Rules.

2. Next the above mandate required absurd filing deadlines. In *Dittes*, the Notice of Appeal was filed on March 29, 2001. Mr. Nugent

entered his notice of appearance a year later on March 29, 2002. However, under the defective provisions and language of this mandate, Mr. Nugent would have had to file Forms C and D within ten (10) days of the Notice of Appeal, even though he did not enter his appearance until a year later on March 29, 2002!

3. Finally, the deputy clerk *failed* to follow Local Rule (LR) 6(c), which requires that preliminary "notice" of an administrative deficiency be furnished *before* an appeal can be defaulted. LR 6(c) provides that:

> In the event of default in any action . . . the Clerk shall issue *a notice to the appellant* that the appeal will be dismissed unless, within ten days thereafter, the appellant shall file an affidavit showing good cause for the default and indicating when the required action will be taken." [App. F, *infra* at 1 (emphasis added)].

The Clerk's Office made no effort to comply LR 6(c).

On October 16, 2003, Petitioner filed a motion to re-instate *Dittes*. He argued there was a double "notice" infraction. First, there was no published notice in the Local Rules *negating* the "waiver" of Forms C and D in pro se appeals, should an appellant retain counsel. Second, the deputy clerk failed altogether to issue required *notice* of an alleged administrative infraction under LR 6(c).

Then Petitioner's motion to reinstate the appeal was inadvertently placed before a single circuit judge. Under Local Rule 27(c) and FRAP 27(c), this substantive motion should have been placed before a three-judge panel.[8] On December 8, 2003, a single judge (the Hon. Reeni Raggi) denied

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[8] Motions addressed to the "recall or modification of any mandate or decision of the court" shall be referred "to the [panel of] judges." LR 27(c). The Clerk's Office violated this local rule. Petitioner's motion to reinstate *should have been placed* before the three-judge panel of February 13, 2002. *See* entry in Second Circuit Docket in complete record below.

the motion without explanation or findings of fact.[9] App. G, *infra* at 1.

B. *Dittes* is Challenged for "Voidness" in the U.S. District Court

On June 28, 2004, Petitioner filed in the U.S. District Court for the District of Connecticut a Rule 60(b)(4) Motion, under the Federal Rules of Civil Procedure ("F.R.Civ.P."), challenging the Second Circuit's dismissal of *Dittes* on the grounds of constitutional "void[ness]".[10] The Rule 60(b)(4) motion was filed in the underlying action of *Dittes* (hereinafter *Dittes II*).

Four months later, Petitioner filed a Rule 60(b)(3) Motion, collaterally attacking the unfairness

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[9] It is debatable whether Judge Raggi's single-judge order was binding. FRAP 27(c) clearly prohibits a single judge from "dismiss[ing] or otherwise determin[ing] an appeal."

[10] Rule 60(b)(4) provides that "on motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . .[when] the judgment is void."

of the underlying *Dittes* trial (hereinafter "*Dittes III*"). This motion, also filed in the U.S. District Court, challenged the court's refusal to allow Petitioner's counsel to conduct the trial. Instead the district court forced Petitioner to conduct his own trial pro se. Undeniably, *Dittes III* would have constituted the direct appeal of *Dittes*—if that appeal had not been dismissed over a due process violation.

On January 5, 2005, the district court summarily dismissed *Dittes II* and *Dittes III*. The district court dismissed *Dittes II* (due process challenge) on the grounds that the district court has "no authority to review a decision of the United States Court of Appeals for the Second Circuit[.]" App. H, *infra* at 1. The district court also dismissed *Dittes III* (collateral attack over fairness) on the grounds of res judicata. "[P]laintiff had the opportunity to raise[] the issues on appeal, but failed

to do so," thus, he "is now 'barred by principles of res judicata and the interest of finality of judgments from mounting a collateral attack on a prior judgment in the present action." App. I, *infra* at 1.

B. Court Applies *Res Judicata* to Extinguish Due Process Challenges in *Dittes II* and *Dittes III*

On February 4, 2005, Petitioner appealed *Dittes II* and *Dittes III* to the Second Circuit. The appeals were not consolidated; they were heard separately before different panels.

On February 16, 2006, the Second Circuit issued a summary affirmance in *Dittes III* (collateral attack) that Petitioner had failed to present any "highly convincing evidence" to grant a motion "to vacate the judgment as void." App. J, *infra* at 1. The panel declined to investigate the "notice" discrepancies in the Local Rules.

Six months later, on August 10, 2006, the Second Circuit issued a four-sentence summary affirmance in *Dittes II* (due process challenge). The panel claimed the appeal was "without merit," App. K, *infra* at 1, but made no effort to inquire into the "notice" issues in the Local Rules.

On February 3, 2006, Petitioner's counsel sent letters to the Second Circuit Rules Committee, as well as the Clerk's Office, requesting that public notice be furnished hereafter in future pro se-to-counseled appeals. App. L, *infra* at 1-8. The Second Circuit declined to answer or provide any reasonable requests for "notice" information.

D. *Dittes Amendments*

The Second Circuit's surprise default in *Dittes* created a "domino effect" for the stayed litigation pending below. While *Dittes II* and *Dittes III* were still on review by the Second Circuit, the district

court entered a stay in the pending amendments in *Dittes.*[11] When the Second Circuit issued summary affirmances in *Dittes II* and *Dittes III*, the district court then dismissed the *Dittes Amendments* on the grounds of *res judicata.*

E. Second Circuit Declines to Recall Mandate in *Dittes*

Petitioner appealed the *Dittes Amendments* to the Second Circuit. On appeal, the Second Circuit consolidated the *Dittes Amendments* into two separate appeals: *Tibbetts v. Levin* (05-5826-CV(L) and *Tibbetts v. President and Fellows of Yale College* (05-5780-CV). A month-and-a-half prior to oral argument for this appeal, on July 7, 2008, Petitioner

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[11] The district court had invited the pro se plaintiff to file amendments in the *Dittes* complaint *without* providing a time frame as to when they were due. Plaintiff filed his amendments (42 days later), but the court disallowed them. Petitioner then filed the amendments as new causes of action to protect the statute of limitations. The court subsequently ruled these amendments warranted separate discovery and trials (hereinafter *"Dittes Amendments"*).

filed a Motion to Recall the Mandate in *Dittes* for Due Process Violations.[12] Petitioner requested that the panel hearing the *Dittes* Amendments *first* rule on the Motion to Recall the Mandate, so as to not compound the ongoing constitutional errors in *Dittes*.

Judge Reeni Raggi was presiding judge for this three-judge panel. On August 7, 2008, the panel *declined* to hear the Motion to Recall the Mandate as "moot," and instead summarily affirmed the district court's application of *res judicata*. The panel cited with approval its decisions in *Dittes, Dittes II,* and *Dittes III*.[13] Meanwhile, the Motion to Recall the Mandate remained untouched on the court's docket.

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[12] This motion to recall the mandate was filed simultaneously in *Dittes* and the pending *Dittes* Amendments. The supporting memorandum was 84 pages long. *See* App. M, *infra* 1-4.

[13] Opinion reprinted at *Tibbetts v. Levin*, 288 Fed. Appx. 743 (2d Cir. 2008)(unpublished).

Four months later, Judge Raggi inexplicably carved away the Motion to Recall the Mandate from the panel hearing the second *Dittes Amendment* (*Tibbetts v. President and Fellows of Yale College* (05-5780-CV)). In so doing, two sitting judges were *denied* the opportunity to review the underlying due process issues in *Dittes*. On December 19, 2008, the panel blindly issued an opinion that *res judicata* also had proper preclusive effect in the second *Dittes Amendment*.[14]

That same date, December 19, 2008, Judge Raggi separately ruled on the Motion to Recall the Mandate holding there was "no merit in the due process claims asserted in the motion." Pet. App. at 1a 5-8. Judge Raggi made no investigation into the Local Rules, but concluded nonetheless that lack of

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[14] Opinion reprinted at *Tibbetts v. President & Fellows*, 303 Fed. Appx. 935 (2d. Cir 2008).

notice does not present "exceptional circumstances justifying the exercise of this court's power to recall a mandate."[15] *Id.* Judge Raggi finished the ruling with an injunction. Petitioner was permanently enjoined from making any further challenges regarding the lack of "notice" requirements in the Second Circuit Local Rules --short of a petition "to the Supreme Court of the United States." *Id.*

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[15] Judge Raggi's order, dated 19 December 2008, constituted the sixth time the court declined or failed to investigate "notice" defects in the Local Rules. The six times are listed as follows: *Dittes* (Dec. 8, 2003); *Dittes III* (Feb. 16, 2006); *Dittes II* (Aug. 10, 2006); *Dittes Amendments (Levin)* (Aug. 7, 2008); *Dittes Amendments* (*President and Fellows*) (Dec. 19, 2009); and *Dittes* (Motion to Recall Mandate) (Dec. 19, 2008).

III. ARGUMENT

A. FAILURE TO FURNISH "NOTICE" REQUIREMENTS FOR PRO SE-TO-COUNSELED APPEALS VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION.

The Due Process Clause of the Fifth Amendment guarantees that "no person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const., amend V. The essential maxim of the "due process of law" is that "individuals must receive notice and an opportunity to be heard before the government deprives them of property." *United States v. $ 8,850*, 461 U.S. 555, 562, n.12 (1983); *Pennoyer v. Neff*, 95 U.S. 714 (1878).

A party whose rights are to be substantially affected is entitled to be heard, and in order that he may enjoy that "right," he or she must first be

"notified." *Lankford v. Idaho*, 500 U.S. 110 (1991). Similarly, the right to *notice* "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Acknowledging this universal principle of jurisprudence, the Court observed:

> From the days of Magna Carta. . . and down to the present time, due process of law includes *actor, reus,* and *judex*; and how is anybody to be *judex* unless he hears?" [*McVeigh v. United States*, 78 U.S. 259, 265 (1871) (quoting *Harris v. Hardeman*, 55 U.S. 334 (1853)

In any situation regarding government-sponsored deprivation, the government must furnish "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 315.

Further, this requirement must be undertaken in good faith, for "when notice is a person's due, process which is a mere gesture is not due process." 339 U.S. 315.

In order to pass constitutional muster, "notice" must state 'where' and at 'what time' a party is to proceed; it must also provide the "legal consequences [that] may ensue" for a failure to act. *Fuentes v. Shevin,* 407 U.S. 67 (1972). Once an interested party has been notified of governmental action, he or she is entitled to be heard:

> The purpose of this requirement is not only to insure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment – to minimize substantively unfair or mistaken deprivations of property[.]

407 U.S. at 80-81 (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1861). Thus the Due Process Clause forbids the government from "extinguish[ing]"

property rights without first affording "notice" and "the opportunity for a hearing on the merits of his cause." *Logan v. Zimmerman Brush Co.* 455 U.S. 422, 429 (1982); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976).

(1). Second Circuit Fails to Furnish "Notice" Requirements for Pro Se-to-Counseled Appeals

The Second Circuit Local Rules do not furnish "notice" requirements of "where" or "at what time" pro se-to-counseled appellants are to proceed. *Fuentes,* 407 U.S. at 81. Nor do the Local Rules provide the "consequences" of a "failure to act." *Id.*

Indeed, the Local Rules are completely silent as to how Forms C and D apply in pro se-to-counseled appeals, if they even apply at all. Initially, the Second Circuit "waives" the requirement of Forms C and D in pro se appeals, but in pro se-to-counseled appeals, the Second Circuit

effectively seeks to revoke this waiver *without furnishing any published notice requirements.* These arbitrary "notice" requirements *cannot* pass "constitutional muster." *Robinson v. Hanrahan,* 409 U.S. 38, 40 (1972) (government made no "effort to provide notice which was 'reasonably calculated' to apprise [petitioners] of the pendency of [judicial] proceedings.").

(2). Test for Due Process Violation

When a claimant invokes the Due Process Clause, there must be a showing that (a) the claimant has a protected liberty or property interest and (b) that the government has deprived the petitioner of a protected liberty or property interest. *Bd. of Regents v. Roth,* 408 U.S. 564 (1972).

Here, the Petitioner had protected property rights in the appeal of *Dittes* as a "cause of action." *Tulsa Professional Collection Servs., Inc. v. Pope*, 485

U.S. 478, 484 (1988) ("a cause of action is a species of property protected by . . . the Due Process Clause"). Property interests protected "by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Bd. of Regents,* 408 U.S. at 564. Finally, there can be no question that the Second Circuit acted to deprive the Petitioner of his opportunity to pursue his appeal. As the Supreme Court noted in *Armstrong v. Manzo,* "there can be no doubt, where as here, the result of that judicial proceeding was permanently to deprive" the petitioner of a property right." 380 U.S. 545, 551 (1965); *Champlin Refining Co. v. Comm.*, 286 U.S. 210, 242-243 (1932) (same).

As a final threshold issue, due process must also be "flexible," calling "for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

"Once it is determined that the Due Process Clause applies, the question remains what process is due." 408 U.S. at 481 (emphasis added). Here the question of "what process is due" is certainly *not* to be found in the Second Circuit Local Rules.

(3). Petitioner Satisfies the Due Process "Test"

Where the government acts to deprive individuals of protected interests or rights, the government must furnish certain procedural safeguards *prior* to the act of deprivation. *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976). In *Mathews*, the Court established a tri-partite test to evaluate the procedural due process safeguards, to include: (1) the "private interests" affected, (2) the risk of "erroneous deprivation," and (3) the "government's interest" and burden in implementing the procedural safeguards. 424 U.S. at 335; *Cleveland Bd. of*

Education v. Loudermill, 470 U.S. 532, 542 (1985) (applying tri-partite test).

Petitioner satisfies the *Mathews* test. First, he can show his property interest was adversely affected "by the official action" of the U.S. Court of Appeals for the Second Circuit. 424 U.S. at 335. Secondly, Petitioner has borne "the risk of an erroneous deprivation." The Supreme Court has repeatedly emphasized that where there is an erroneous deprivation, the "loss of [constitutional] freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citing *New York Times Co. v. United States*, 403 U.S. 713, (1971)). In this case, Petitioner has been "erroneous[ly] depriv[ed]" of a property right for seven years, from 2003 to the present. To any reasonable mind, a seven-year deprivation constitutes an "irreparable injury."

Eastland v. U.S. Servicemembers' Fund, 421 U.S. 491, 495 (1975).

Finally, there must be an analysis of the "government's interest" and any financial or administrative burden to implement procedural safeguards. *Mathews*, 424 U.S. at 335. In this circumstance, it is inconceivable that the Second Circuit would be *prejudiced* with additional administrative "burdens" in furnishing notice of "procedural requirement[s]" in its Local Rules for pro se-to-counseled appeals.

B. GOVERNMENT'S INSUFFICIENT "NOTICE" RAISES THE 'VOID FOR VAGUENESS DOCTRINE'

The Supreme Court has ruled that where there is an insufficient degree of government "notice" to citizens, the Due Process Clause embodies a "void-for-vagueness" doctrine. *City of Chicago v. Morales*, 527 U.S. 41 (1999). In *Morales*, a government rule

"fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits." 527 U.S. at 56 (citing *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403 (1966)). "The purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law." *Morales*, 527 U.S. at 56.

Stated another way, American citizens "are entitled to be informed as to what the [government] commands or forbids." *Lazetta v. New Jersey*, 306 U.S. 451, 453 (1939). The 'void-for-vagueness' doctrine applies to *any government law or statute* that is "so vague" as to leave the public "without knowledge of the nature of the activity that is prohibited." *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997).

In this case, the failure to provide guidance in the Local Rules as to whether Forms C and D apply in pro se-to-counseled appeals is "so vague as to what the [government] commands or forbids," that "it leaves the public uncertain as to the conduct it prohibits." *Morales*, 527 U.S. at 56; *Giaccio*, 382 U.S. at 402. The Second Circuit's Revised Local Rules for 2010 fare no better; they still fail to furnish "notice" requirements as to "how" or "where" Forms C and D should apply in pro se-to-counseled appeals.[16]

Under current federal law, where there is government omission or "silence" regarding the applicability of rules or laws, it generally means that

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[16] Any rule that "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, (1926).

the act is "not required."[17] Moreover, any government rules effecting the public interest will not be granted "institutional deference," especially where such ambiguities produce "constitutional harm." *Barnhart v. Walton*, 535 U.S. 212, 218 (2002); *Cline v. Frink,* 274 U.S. 445, 458 (1927).

C. INSUFFICIENT "NOTICE" FOR A CLASS VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT

Although the Fifth Amendment does not contain a *per se* "equal protection clause," it does restrain the government from actions that are so "discriminatory" as to amount "to a complete denial of due process." *Detroit Bank v. United States*, 317

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[17] The general rule is that where the government "includes particular language in one section of a [rule] but omits it in another section . . . , it is generally presumed that [the government] acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 646 U.S. 16 (1983); *United States v. Cohen Grocery Co.*, 255 U.S. 81, 89-92 (1921).

U.S. 329 (1943); *Currin v. Wallace,* 306 U.S. 1 (1939). The "concepts of equal protection and due process, both stemming from our American ideal of fairness," are not mutually exclusive and/or interchangeable, but it will act to *forbid* the government from any discriminatory conduct that is so "unjustifiable" as to be "violative of due process." *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954) (citing *Steward Machine Co. v. Davis,* 301 U.S. 548, 585 (1937)).

In challenges under the Equal Protection Clause, where there is governmental "vagueness," the court must apply "strict scrutiny" to the government's discriminatory scheme. *Tennessee v. Lane*, 541 U.S. 509 (2004); *Califano v. Webster*, 430 U.S. 313 (1977) ("strict scrutiny" applies to any challenge under the Equal Protection Clause). To survive "scrutiny," the infringing entity must demonstrate "important governmental objectives," and a

discriminatory scheme substantially "related to achievement of those objectives." 430 U.S. at 316.

In this case, it is inconceivable that the Second Circuit can demonstrate a "governmental objective" in depriving basic "notice" requirements to an identifyiable class of litigants. In *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972), it was held that vague government rules "impermissibly delegate basic policy matters to . . . judges . . . for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." This "application" similarly occurs over "vague" rules in the Second Circuit. And under strict scrutiny of the Equal Protection Clause, the Second Circuit's systematic denial of "notice" would undoubtedly constitute an "invidious" and "unjustified" discrimination against a class of citizens. *Washington v. Davis*, 426 U.S. 229, 240 (1976).

IV. REASONS FOR GRANTING THE WRIT

1. "REMEDY" FOR A DUE PROCESS VIOLATION IS TO "SET ASIDE" THE OFFENDING JUDGMENT

If due process is to be in any way *meaningful*, then remedies must be available to injured parties. This issue obviously takes on unique constitutional dimensions when the government inflicts injuries and deprives parties of constitutional rights.

In *Armstrong v. Manzo*, 380 U.S. 545 (1965), the Supreme Court unanimously held that the only "remedy" for a due process violation is to grant the "motion to set aside the decree and consider the case anew." *Id* at 552.

In *Armstrong*, the petitioner received no "notice of any kind" for the pendency of a child-custody "proceeding." 380 U.S. at 547-548. Without any notice of the hearing, the petitioner lost custody

of his daughter. In subsequently learning of the decree, he immediately appealed to his state's appellate courts, but to no avail.

On petition for *certiorari*, the Supreme Court reversed the Texas Supreme Court and held as follows:

> . . . . there is no occasion to linger long. It is clear that a failure to give the petitioner notice of the pending [] proceedings violated the most rudimentary demands of the due process of law. "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust, Co.*, 339 U.S. 306, 313 (1950)." [380 U.S. at 550].

The facts set forth in *Dittes* are just as egregious as those in *Armstrong*. Petitioner received no "notice of any kind," 380 U.S. at 547-548, he was

faced with double-notice violation[18], and thereafter made multiple constitutional challenges over the defective notice procedures of the court's local rules. These subsequent burdens continued for almost seven years. In *Armstrong*, the Court addressed the "burdens" created by trial court's failure to provide "due process of law." Opining for the unanimous Court, Justice Stewart declared that:

> Had the petitioner been given timely notice which the Constitution requires, [the] moving part[y] would have had the burden of proving their case as against whatever defenses the petitioner might have interposed. . . . Instead the petitioner was faced on his first appearance in the courtroom with the task of overcoming an adverse decree entered by one judge, based upon a finding of non-support made by another judge. . . . [T]hese burdens would not have been imposed upon him had he

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[18] Petitioner's double-notice violation consisted of a lack of "notice" requirements in the Second Circuit Local Rules, and the deputy clerk's failure to provide "notice" of an administrative deficiency under LR 6(c).

> been given timely notice in accord with the Constitution. [380 U.S. at 551].

According to *Armstrong*, the remedy for a due process violation is to set aside the "offending judgment," *Id.* at 552. Anything less will undermine the protections afforded by the Due Process Clause:

> Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place. . . . . [380 U.S. at 552].

In *Peralta v. Heights Med. Center, Inc.*, 485 U.S. 80 (1988), in considering another default judgment "entered without notice," this Court again unanimously reiterated the constitutional maxim:

> Where a person has been deprived of property in a manner contrary to the most basic tenets of due process . . . . [O]nly "wiping the slate clean . . . would have restored the petitioner to the position he would have occupied had due process of law been accorded him in the first place." The Due Process Clause demands no less in this case."

485 U.S. 80, 86-87 (1988)(quoting *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915).

Where the mandate in *Dittes* was also "entered without notice," that judgment too must "be set aside" and the "slate "wipe[d] clean," *Armstrong*, 380 U.S. at 552. "The Due Process Clause demands no less." *Peralta,* 485 U.S. at 86-87; *Gray v. Netherland*, 518 U.S. 152 (1996) ("A pro forma opportunity will not do."); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978) (judgment "set aside" where "no mention was made of a procedure for the disposition of certain claims").

2. EXTRAORDINARY WRIT IS WARRANTED TO CORRECT DUE PROCESS DEFECTS IN SECOND CIRCUIT

Rule 20.1 of the Supreme Court Rules governs the procedure for issuing an extraordinary writ. "To justify the granting of any such writ, the petition

must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court."

This petition satisfies the requirements for an extraordinary writ under Rule 20.1:

1. For the Court to consider an extraordinary writ, it must be in "aid of the Court's appellate jurisdiction." Here, jurisdiction, is firmly established under Article III of the U.S. Constitution. "The judicial power of the United States, shall be vested in one Supreme Court," with supervisory authority over "such inferior courts as the Congress may from time to time ordain and establish." Art. III, U.S. Const. Congress also enacted the Rules Enabling Act (28 U.S.C. § 2071), which gives the Supreme Court "jurisdiction" over the local rules,

practices and processes of both district and circuit courts.

2. The above case also establishes three elements to support an "exceptional circumstance." First, the Local Rules of the Second Circuit are not in compliance with the Due Process Clause of the Fifth Amendment. Second, the facts in *Dittes* set forth an ongoing governmental deprivation of "notice" to an entire class of appellants in the Second Circuit. Third, the court revised the Local Rules in January 2010, but failed to cure the defective "notice" requirements for the adjudication of pro se-to-counseled appeals. Taken as a whole, these three collective factors arguably raise an "exceptional circumstance" that would warrant the exercise of an extraordinary writ to "aid the Court's appellate jurisdiction."

3. Finally, short of passing legislation in Congress, adequate relief cannot "be obtained in any other form or from any other court." While the House of Representatives and U.S. Senate could introduce legislation to compel the Second Circuit to furnish constitutionally sufficient "notice" requirements for *all litigants,* this drastic legislation would only underscore a short fall of the Supreme Court's supervisory power as enumerated under 28 U.S.C. § 2071: "The Supreme Court shall have the power to prescribe general rules of practice and procedure . . . for cases in the . . . courts of appeals."

A. Mandamus Is Warranted Under 28 U.S.C. § 1651

Congress promulgated 28 U.S.C. § 1651(a) (the "All Writs Statute") to aid the Court's "appellate

jurisdiction."[19] Historically, this writ has been used to direct lower courts to comply with lawful statutes, or in those instances where lower courts have either "abused discretion" or engaged in a "judicial usurpation of power." *De Beers Consolidated Mines v. United States*, 325 U.S. 212, 217 (1945) ("[W]hen a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power—the situation falls precisely within the allowable use [of this writ]."); *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943) (the writ is "in aid of appellate jurisdiction . . . to confine an inferior court to a lawful exercise of its prescribed jurisdiction . . . when it is its duty to do so.").

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[19] 28 U.S.C. § 1651(a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

This petition respectfully warrants consideration of mandamus. For over three decades, the Second Circuit has failed to furnish "notice" requirements in pro se-to-counseled appeals. From 2003 to the present, the Second Circuit has failed and/or declined to investigate "notice" defects in the Local Rules on six separate occasions. Further, the Second Circuit has enjoined the Petitioner from challenging his due process rights in the Local Rules. Finally, the Revised Local Rules (2010) indicates the Second Circuit intends to continue notice deprivation for this category of appellants into the foreseeable future.

As noted above, the Second Circuit's "arbitrary exercise of the powers of government" fails to "satisfy the minimum standards of due process." *Green v. Lindsey*, 456 U.S. 444, 453-454 (1982). It is precisely this institutional pattern of avoiding a constitutional

review of the Local Rules which arguably demonstrates an "abuse of discretion"[20], or a 'judicial usurpation of power," or both.[21]

Where the Fifth Amendment guarantees due process rights to citizens--no court of law may "constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safe-guards." *Vitek v. Jones*, 445 U.S. 480, 490-491 (1980); *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974).

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[20] Abuse of discretion is a judicial standard "asserted to be grossly unsound, unreasonable, or illegal." Black's Law Dictionary (West Group, 7th Ed., 1999) pg.11.

[21] While it is true that 28 U.S.C. §2071 affords circuit courts a degree of latitude in framing local rules, under no circumstances may a court fail to provide "notice" requirements, such that there is a failure to state "where" and at "what time" a party is to proceed, or provide the "legal consequences [that] may ensue" for a failure to act. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

3. FOUR ISSUES MUST BE REVIEWED IN THE SECOND CIRCUIT LOCAL RULES

Dittes presents a proper vehicle to review the "notice" issues in the Local Rules of the Second Circuit. Granting certiorari would permit the Supreme Court to exercise its statutory and "inherent supervisory power" to ensure these court's local rules "are consistent with 'the principles of right and justice.'" *Frazier v. Heebe*, 482 U.S. 641, 642 (1987); *In Re Ruffalo*, 390 U.S. at 554.

Specifically, four local rules and practices require review. They are as follows:

1. The Second Circuit does not furnish "notice" requirements for pro se-to-counseled appellants. For seven years (2003-to the present), the Second Circuit has been "on notice" that its Local Rules contain constitutionally insufficient "notice" for pro se-to-counseled appellants.

   Does the Due Process Clause have sufficient reach to require the Second Circuit to furnish

"notice" requirements for pro se-to-counseled appeals?

2. The Second Circuit utilizes Forms C and D, as well as *pro forma* dismissal mandates, for the administrative dismissal of pro se-to-counseled appeals. There are no published "notice" requirements as to "how" or "where" Forms C and D apply in the adjudication of these appeals.

   Should the Due Process Clause of the Fifth Amendment weigh-in on this local practice? If so, should Forms C and D be amended or revised to include "notice" requirements as to their applicability in all types of adjudication?[22]

3. The Second Circuit authorizes deputy clerks to "dismiss" appeals on behalf of the Clerk of the Court over alleged administrative violations. *See* deputy clerk dismissal of *Dittes*, App E infra.

   Should there be some protections under the Due Process Clause to ensure the Clerk of

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[22] *See* Revised Form C, App, N, *infra* at 1. Proposed change could state Form C must be submitted within 14 days of the Notice of Appeal, *or within 14 days of counsel's "notice of appearance" in pro se appeals.*

Court has properly and lawfully authorized a junior clerk to "dismiss" or "determine" appeal?[23]

Likewise, if a deputy clerk dismisses an appeal without the signature of the Clerk of the Court[24], should this dismissal order be accorded the same weight and authority of a dismissal by the Clerk or a three-judge panel?

4. Finally, the Second Circuit authorizes single circuit judges to be the final voice in "determin[ing]" or "dismiss[ing]" appeals.[25] In

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[23] Second Circuit Local Rule 27.1 permits the Clerk of the Court to "decide routine, unopposed procedural motions." LR 27.1. This rule does *not permit a deputy clerk* to "decide" or determine these motions.

The likelihood of error in allowing a deputy clerk to dismiss an appeal is enormous. In *Dittes*, the deputy clerk used the wrong dismissal form, then failed to follow due process protections provided under Local Rule 6 (c). This is precisely the kind of action wherein fairness is rarely obtained in a"one-sided determination of facts decisive of rights." *Joint Anti-Facist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-172 (1951). "No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."

[24] A signature signifies to appellant and public alike that the facts in the dismissal have been reviewed and *approved* by the Clerk of the Court.

[25] Judge Raggi twice "determine[d]" or "dismiss[ed]" the appeal of *Dittes*. The Advisory Committee Notes states that only "[s]ome types of motions may be ruled on by a single judge." USCS Fed Rules App Proc R 27 Such motions are only for *intermediate relief*. Most circuit courts specifically

Dittes, a single judge twice "dismiss[ed]" or "determin[ed]" this appeal (December 8, 2003 and December 19, 2008).

Where a single circuit judge has "dismiss[ed]" or determine[d]" an appeal—is that single-judge order (a) in compliance with the three-judge rule set forth 28 USC 46(c) [26] and FRAP 27(c)? (b) should a single-judge order invoke the law-of-the-case doctrine? [27] and (c) should that order be binding on subsequent panel reviews?[28]

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enumerate the motions which may be considered by a single judge. As evidenced in *Dittes*, the Second Circuit is far more permissive in the motions that a single judge may review and determine.

[26] 28 USC § 46(c) provides in pertinent part that "[c]ases and controversies shall be heard and determined by a court or panel of not more than three judges."

[27] A single-judge-order established the "law-of-the-case" in *Dittes*. Judge Raggi's order (finding no due process violation) bound all subsequent merits panel reviews so much so that *res judicata* permeated all subsequent rulings. See *Friends of Earth v. Reilly*, 966 F.2d 690, 696 n. 7, 296 U.S. App. D.C. 170 (D.C. Cir. 1992) (expressing doubt that a "single judge acting on a motion . . . can bind a full panel" and invoke the "law-of-the-case" doctrine).

[28] The local practice allowing a single-judge to "dismiss" or "determine" appeals substantially deviates from the other circuit courts. *See Locke v. Allstate Ins. Co.*, 696 F.2d 1340 (11th Cir. 1983)(holding that a single-judge order, not appealed to a three-judge panel under FRAP 27(c), "was nonbinding").

4. LOCAL RULES VIOLATE FRAP 47

Congress enacted FRAP 47(a) to ensure that the local rules of district and circuit courts furnish "*fair rules*" and "*notice*" to all litigants. Moore's Federal Practice 3d, Local Rules by Courts of Appeals, § 347.6-10 (1997). Concerned that "notice" may be insufficient in the local rules of some courts, in 1995, Congress *expanded* the limitations on the rule-making authority of district and circuit courts. To this end, Congress promulgated FRAP 47 (b) which requires in pertinent part that:

> "[n]o sanction or other disadvantage may be imposed for noncompliance with any requirement not in . . . the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement." [FRAP 47 (b)].

Despite this prohibition against arbitrary enforcement of local rules without "actual notice," the Second Circuit has acted with impunity by imposing

"sanctions" and "other disadvantage[s]" over fuzzy and inconsistent applications of Forms C and D. This arbitrary application of local rules and forms, without "actual notice," has caused "part[ies] to lose rights."

FRAP 47(b) is not an *option*. The Federal Rules of Appellate Procedure is a statutory mandate that requires circuit courts to uphold all rules under FRAP, not just some of them. Congress also promulgated 28 U.S.C. § 2071 to ensure the local rules of these courts do not abridge or modify any substantive rights, and that these local rules remain "consistent with Acts of Congress." 28 U.S.C. § 2072.

In *Societe Internationale v. Rogers*, 357 U.S. 197 (1958) the Supreme Court underscored that "constitutional limitations upon the power of courts, even in aid of their own valid processes," do not permit them "to dismiss an action without affording

a party the opportunity for a hearing on the merits of his cause."). The Court further held that where there are any instances of deprivation, a court's rules "must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law." *Id.* at 209 (citing *Hovey v. Elliott,* 167 U.S. 409 (1897) and *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1908)).

The holdings in *Dittes* unequivocally violate the "notice" protections in FRAP 47 (a)(b). This Court should grant certiorari to re-emphasize the fundamental importance that local rules must be consistent with the statutes of Congress, and that they should be "devised to promote the ends of justice, not defeat them." *Hormel v. Helvering*, 312 U.S. 552 (1941); *Stickney v. Wilt*, 90 U.S. 150, 162 (1874).

5. DITTES IS INCONSISTENT WITH FEDERAL LAW

For decades the Supreme Court has emphasized that the harsh sanctions of a default should only lie to penalize a party's "willful," "deliberate" or "contumacious conduct." *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976) (*per curiam*). Nowhere in *Dittes* is there a scintilla of evidence to support "deliberate" or "contumacious conduct" to support the draconian sanction of a default.

Three years ago, in *Woodford v. Ngo*, the Supreme Court *re-emphasized* that "courts should not impose the draconian punishment of procedural default" where litigants "make reasonable, good-faith efforts to comply," but by "simple inadvertence, make some procedural misstep along the way." 548 U.S. 81, 119 (2006). Here, Petitioner and his counsel

made every effort to follow the court's procedural requirements--but the underlying "procedural misstep," allegedly done by the Petitioner or his counsel, *is not even to be found in the Local Rules.*

The lack of "notice" in the Second Circuit Local Rules does not, *and cannot*, justify the "draconian" sanction of of a default. *Id.* As the Supreme Court makes clear, any court decision to enter a default must be the "last resort," and it may only be ordered if "non-compliance" is due to "willful" and "bad faith disregard." *Societe Internationale v. Rogers*, 357 U.S. 197, 212 (1958).

This case does not even come close to the requirements for a "draconian" default. 548 U.S. at 119. The simple fact remains that the Second Circuit cannot identify *any published rule* that the Petitioner "disregard[ed]" or failed to satisfy. *Id.*

(A) *Dittes* is Inconsistent with Second Circuit Case Law

There is certain irony in the Second Circuit's inability to base a default on alleged "willfulness in *Dittes*." Three decades of case law reveals the extent of the "unjust," "erroneous" and "inconsistent" applications over Forms C and D.

In *Fox. v. Amtrak,* 241 Fed. Appx. 771, 772 (2d Cir. 2007), the appeal was dismissed for failure to file Forms C and D, but appellant proceeded pro se, and the court "granted Fox's motion to reinstate his appeal." In *LeBoeuf, Lamb, Greene & MacRae v. Worsham Group, Inc.,* 185 F.3d 61, 63 (2d Cir. 1999), the appeal was dismissed for failure to file Forms C and D, but on subsequent appeal, the court heard the dispute and "reversed" judgment. In *Gilroy v. Erie Lackawanna R.R. Co.*, 421 F.2d 1321, 1323 (2d Cir. 1970), an attorney failed to file Forms C and D for

twenty months, but court *declined* to dismiss the appeal, and instead affirmed "sanctions" and "costs."

Equally, a review of Second Circuit case law regarding the recall of mandates over Forms C and D shows inconsistencies, when compared to *Dittes*. *See, for example*, *Calloway v. Marvel Entertainment Group,* 854 F.2d 1452, 1473 (2d Cir. 1988) (pro se appeal dismissed for "failure to prosecute," but on a motion for reconsideration, court "recall[ed] the mandate and reinstat[ed]" the appeal); *United States v. All Assets of Statewide Auto Parts,* 971 F.2d 896, 900 (2d Cir. 1992) ("appeal was dismissed. . . for failure to comply with the require-ments" of Forms C and D, but on motion to recall, mandate was "vacated and case restored to the calendar"); *Metzen v. United States*, 19 F.3d 795 (2d Cir. 1994) ("appeal was dismissed for failure to comply" with Forms C and D, but mandate was recalled and appeal "reinstated" by

a subsequent "scheduling order" from clerk's office); *Gaines v. Kelly*, 202 F.3d 598, 601 (2d Cir. 2000) ("appeal was dismissed for failure" to comply with CAMP, but two years later, court granted pro se appellant's "motion to recall mandate").

To summarize, the default in *Dittes* is not only inconsistent with federal and Second Circuit case law, it is outright unconstitutional. *Schroeder v. City of New York*, 371 U.S. 208, 210 (1962) (judgment reversed as "void" where the court failed to give "adequate notice" of judicial proceedings); *Riverside and Dan River Cotton Mills v. Menefee*, 237 U.S. 189, 195 (1915) (same).

5. RES JUDICATA SHOULD NOT EXTINGUISH DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT

The Second Circuit has blazed a new trail in American Jurisprudence with its proposition that *res judicata* can be used to *extinguish* due process challenges under the Fifth Amendment. The novelty of this proposition is completely inapposite to centuries of well-settled law in this land. A final judgment must "satisfy the applicable requirements of the Due Process Clause," otherwise no court "may grant preclusive effect to a constitutionally infirm judgment." *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 481 (1982); *Baldwin v. American Surety Co.*, 287 U.S. 156 (1932) ("entry of the judgment without notice . . . violate[s] the due process clause").

In *Dittes*, the evidence strongly suggests that the Second Circuit deliberately overlooked important

judicial obligations to determine "applicable requirements of the Due Process Clause." 456 U.S. at 481. On no less than six separate occasions, the Second Circuit has declined or refused to investigate the "constitutionally infirm judgment" in *Dittes*. While it is understandable there is a "presumption of regularity which attaches to final judgments," *Parke v. Raley*, 506 U.S. 20, 21 (1992), it is inexcusable and a public outrage for the Second Circuit to fail or obstruct an investigation into due process concerns over the Local Rules. Surely this must be an "unprecedented departure from accepted principles of res judicata." *Fed Dept. Stores, v. Moitie*, 452 U.S. 394, 399 (1981).

If this Court allows *Dittes* to stand, it will foster precisely the arbitrary governmental action that the Founders intended to *prevent* with the Due Process Clause. Under the Constitution, no citizen

shall be bound by a "final judgment" that is inconsistent with the "due process of law," and any such action enforcing this judgment "is not that due process which the Fifth Amendment . . . requires." *Postal Telegraph Cable Co. v. Newport,* 247 U.S. 464, (1918); *Old Wayne Mutual Life Assn. v. McDonough,* 204 U.S. 8 (1907).

6 SECOND CIRCUIT'S LOCAL RULES CREATE INCONSISTENT APPLICATION OF DUE PROCESS AMONG CIRCUIT COURTS

Eleven U.S. Courts of Appeals base their local practice and procedures on *post-docketing forms* for the adjudication of their appeals. *See* App A *infra* at 1-3. The First, Fourth, Sixth, Seventh, Eleventh and DC Court of Appeals have pre-argument statements (similar to Form C in the Second Circuit), but these forms are *not* required until *after* the appeal is docketed in the circuit court. Likewise,

eleven circuit courts require transcript forms (similar to Form D), but these, too, are not required until *after* the appeal is docketed. All of the administrative forms and mechanisms for the adjudication in these circuit courts revolve around the date the appeal is *docketed* in that court.

The Second Circuit is fundamentally different because its administrative requirements essentially revolve around *pre-docketing forms,* and the date of the Notice of Appeal in the district court below. Although this reliance on pre-docketing forms is not necessarily incorrect (as long as proper "notice" is provided), it becomes problematic when, as here, the Second Circuit demonstrates an inflexible and rigid application and enforcement of local forms. Moreover, it becomes constitutional where there are no published "notice" requirements as to how these

pre-docketing forms apply in a *post-docketing activity,* such as a pro se-to-counseled appeal.

The Second Circuit's intransigence over its Local Rules has created a serious ripple in the consistency of the "due process of law" among the circuit courts. If this public issue is not addressed, then the Second Circuit's Local Rules, complete with insufficient "notice" requirements and discriminatory applications, will acquire the "imprimatur of the Supreme Court's rule-making authority." *Ticor Title Ins. Co. v. Brown*, 114 S.Ct. 1359 (1994); *Hudson v. Parker*, 156 U.S. 277, 281 (1895) (Supreme Court is ultimately responsible for rule-making authority in all "inferior courts").

V. SUMMARY

This petition illustrates the grave dangers when a circuit court's overbearing application of local rules diminish the substantive rights guaranteed by the Constitution. The U.S. Circuit Courts of Appeals have been entrusted with the high calling to balance the needs for procedural efficiency, while upholding due process protections. In *Stanley v. Illinois,* 405 U.S. 645, 656 (1972), the Supreme Court elaborated on this important balancing act:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy . . . ." [*see also United States Dep't of Agriculture v. Murry*, 413 U.S. 508, 514-515 (1973)].

The Second Circuit's actions in *Dittes* typify an "overbearing concern for efficiency and efficacy." *Id.* These actions caused "part[ies] to lose rights," without "actual notice of requirement[s]." FRAP 47(b). It is unfortunate that the Second Circuit's zeal in enforcing its local rules is at the expense of the higher values embraced by the Constitution. *Id.* at 656.

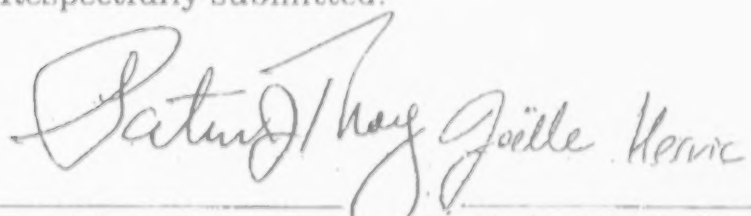
The Supreme Court must grant certiorari to review the insufficient "notice" requirements, and inconsistent pre-docketing forms, in the Second Circuit Local Rules. The Second Circuit Local Rules, like the Supreme Court Rules, must be "consistent with Acts of Congress," and uphold all aspects of the Due Process Clause, which "comport[s] with the deepest notions of what is fair and right and just." *Solesbee v. Balkcom,* 339 U.S. 9, 16, 70 S.Ct. 457 (1950). In sum, where fundamental notions of the

Due Process Clause are at stake, both in the Second Circuit and the consistency throughout the circuits, then "this essential constitutional promise may not be eroded." *Hamdi v. Rumsfield*, 542 U.S. 507, 533 (2004).

VI. CONCLUSION

WHEREFORE, for all of the foregoing reasons, so that that the Due Process Clause of the Fifth Amendment may not be eroded, this Petition should be granted.

Respectfully submitted.



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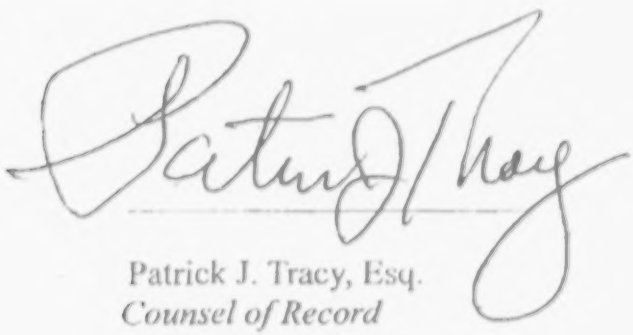
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 33(1)(h) of the Supreme Court Rules, it is hereby certified that the word count of this petition is 8,881. The word count was acquired on Microsoft Office Word 2007, to include footnotes. The word count excludes the text of constitutional provisions, statutes, and regulations, which is 351 words, as permitted under Rule 14 (1)(f) and Rule 33(1)(d).



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PETITIONER'S

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, U.S. Const., Section 1, paragraph 1

> The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Article III, U.S. Const., Section 2, paragraph 2

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original jurisdiction.

Amendment V. U.S. Const. (Due Process Clause)

> "No person shall . . . be deprived of life, liberty, or property, without due process of law"

28 USC § 46(c)

> *Cf.* 28 USC § 46(c): "Cases and controversies shall be heard and determined by a court or panel of not more than three judges."

28 U.S.C. § 1651(a):

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

28 USC § 2071

> (a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.
>
> (b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have effect on

(c) pending proceedings as the prescribing court may order.

(d) (1) Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.

(e) If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment.

28 USC § 2072

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the . . . courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

FRAP 27 (c) (Power of a Single Judge To Entertain A Motion)

A circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding. A court of appeals may provide by rule or by order in a particular case that only the court may act on any motion or class of motions. The court may review the action of a single judge.

FRAP 47 (a) "Local Rules"

:

(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

FRAP 47 (b) ("Procedure When There Is No Controlling Law"):

> A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

UNITED STATES COURT OF APPEALS
For the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moyhihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 19th day of December, two thousand eight,

Present: FILED: DEC. 19, 2008

Hon. Reena Raggi,
Circuit Judge,

Jeffrey L. Tibbetts,
Plaintiff-Appellant,
v. 01-7377-cv
James Ditties, et al.,
Defendants-Appellees

Jeffrey P. L. Tibbetts,
Plaintiff-Appellant,
v. 01-0694-cv
Dwayne E. Huebner, et al.,
Defendants-Appellees

Jeffrey P. L. Tibbetts,
Plaintiff-Appellant,
v. 01-4695-cv
James Ditties, et al.,
Defendants-Appellees

Jeffrey P. L. Tibbetts,
Plaintiff-Appellant,

v. 01-5780-cv

President & Fellows of Yale College, et al.,
Defendants-Appellees

John Rowland, et al.,
Defendants

Upon review of the dockets in the above-captioned appeals, and following the resolution of plaintiff-appellant Tibbetts's appeal in 05-5780-cv, it is hereby ORDERED as follows:

In Tibbetts v. Ditties, 01-7377, Tibbetts's July 24, 2001 "motion to clarify the Court's Order," and November 30, 2001 "motion to allow notice of default," and defendants-appellants' motions of June 13, 2003, and November 6, 2003, to dismiss the appeal, are DENIED as moot in light of the court's orders of September 16, 2003 and December 8, 2003, dismissing the appeal and denying Tibbetts's motion to reinstate. In addition, upon review and full consideration of the claims presented therein, Tibbetts's motion to recall the mandate, "motion for 'Notice' requirements in pro-se-to counseled appeals, and to be relieved of the unpublished requirements in pro-se to counseled appeals," and "motion to file an oversized memorandum of law," each docketed in 01-

7377 on July 7, 2008, are DENIED. This action does not represent "exceptional circumstances" justifying the exercise of this court's power to recall a mandate, see, Sergeant v. Columbia Forest Products, Inc., 75 F.3d 86, 89 (2d Cir. 1996), as we find no merit in the due process claims asserted in the motions.

For the same reason, Tibbetts's motions to recall the mandate in Tibbetts v. Ditties, 05-0694, and Tibbetts v. Ditties, 05-4695, docketed in those actions on July 7, 2008, are DENIED.

Tibbetts's motion for the assignment of *pro bono* counsel in Tibbetts v. President & Fellows of Yale College, 05-5780, filed on September 6, 2007, is DENIED as moot in light of the notice of appearance filed in that action by Andrew J. Schatkin on October 1, 2007.

Finally, in the recent order disposing of the appeal in Tibbetts v. President & Fellows of Yale College, 05-5780, the court imposed certain conditions on Tibbetts's future filings in this court. We adopt those conditions as part of this order and advise Tibbetts that non-compliance can result in sanctions.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: Franklin Perry

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JEFFREY P.L. TIBBETTS, M.DIV	:
	: CASE NO.
Vs.	:3:95CV00995
	:(AVC)
JAMES DITTES and DWAYNE HUEBNER in their personal capacities: of THE YALE DIVINITY SCHOOL, and THE YALE CORPORATION and and ADMINISTRATORS AND FACULTY OF YALE DIVINITY SCHOOL, in their official capacities: DEAN THOMAS OGLETREE, ADMISSIONS DIRECTOR JAMES GARRETT, FORMER PROFESSIONAL STUDIES COMMITTEE CHAIRMAN HARRY ADAMS, DIRECTOR PENE-LOPE LAURENS, and YDS REGI-STRAR DETRA MACDOUGALL	:

JUDGMENT

This action having commenced by a complaint and having been assigned to the Honorable Alfred V. Covello, Chief United States District Judge; and

The Court having issued a Ruling and Order

on May 17, 1996, that defendants Dwayne Huebner and Harry Adams had not been served with process; and

The matter having then been tried before a jury on the plaintiff's claims against defendants James Dittes, Thomas Ogletree, Penelope Laurens, Detra MacDougall and Yale University; and on January 19, 200, the jury having returned a verdict in favor of the defendants; and further

The Court having issued an Order on March 28, 2000, dismissing the action as to defendant James H. Garrett; it is therefore

ORDERED, ADJUDGED and DECREED that the complaint is dismissed as to defendants Huebner, Adams and Garrett; and it is further

ORDERED, ADJUDGED and DECREED the judgment be and is hereby entered for defendants Dittes, Ogletree, Laurens, MacDougall and Yale University.

Dated at Hartford, Connecticut this 29th day of March, 2000

KEVIN F. ROWE, CLERK

BY: Mary A. Wiggins

Deputy Clerk

U.S. COURTS OF APPEALS: ANALYSIS OF PRE-DOCKETING REQUIREMENTS

U.S. Circuit Court	Predocketing Forms Other Than NOA?	Counsel File Predocketing Forms?	Pro Se File Predocketing Forms?	Requirements to transfer pro se-to-counseled appeal?	Dismissal by Deputy Clerk?
FIRST CIR. (www.ca1.uscourts.gov) (617-748-9057)	No: Transcript and Docketing Statement due *after* appeal is docketed	No: (Forms due 14 days *after* appeal is docketed)	No: Transcript is optional *after* appeal is docketed	"Notice of appearance" (due 14 days *after* initial appearance)	No: ("Multiple warnings" Only dismissed by Clerk after certified attempts at notice)
SECOND CIR. (www.ca2.uscourts.gov) (212-857-8500)	Yes: Form C docketing and Form D (transcript)	Yes: Forms C and D must be filed with 14 days of NOA	Yes: Form C and D "waived" prior to 2/2010. (Revised 2010: Form C required. Forms C and D 14 days from NOA)	Notice of appearance (unpublished requirement) Forms C and D filed retroactively to NOA	Yes
THIRD CIR. (www.ca3.uscourts.gov) (215-597-2995)	No: Transcript certification due 14 days after letter of appeal docketing	No: (Transcript due 14 days *after* appeal is docketed; Mediation statement optional)	No: Only NOA and filing fee; transcript is optional after appeal is docketed	"Notice of Appearance" (14 days after appearance)	No: (Follow-up letters of notice sent; only "motion panel may grant a motion to dismiss an appeal" IOP 10.3.5.)
FOURTH CIR. (www.ca4.uscourts.gov) (804-916-2700)	No: Transcript and docketing statement due *after* appeal is docketed	No: (Statement of Issues and Transcript Form due 14 days *after* appeal is docketed and numbered).	No: NOA and Filing Fee; statement of issues is optional	"Notice of Appearance"; (Transcript Form is optional)	No: (Notice for compliance sent first, Clerk will consider dismissal if failure to cure deficiency).

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U.S. Circuit Court	Predocketing Forms Other Than NOA?	Counsel File Predocketing Forms?	Pro Se File Predocketing Forms?	Requirements to transfer pro se-to-counseled appeal?	Dismissal by Deputy Clerk?
FIFTH CIR. (www.ca5.uscourts.gov) (504-310-7700)	No: (Transcript Form due *after* appeal is docketed)	No: (Transcript is due 15 days *after* appeal is docketed)	No: (Filing Fee and NOA)	"Notice of Appearance Form" (15 days after appearance)	No: (Merit panel review; reinstatement authorized where deficiency is cured)
SIXTH CIR. (www.ca6.uscourts.gov) (513-564-7000)	No : (Statement and Transcript due *after* appeal is docketed)	No: (Statement and Transcript due 14 days *after* docketing)	No: (Fillable Pro se Forms on website after appeal is docketed)	"Notice of appearance" (14 days after notice given; statement of issues is optional)	No: (Notice required before any appeal can be dismissed; only Clerk of Court can dismiss for failure to prosecute)
SEVENTH CIR. (www.ca7.uscourts.gov) (312-435-5850)	No: (Transcript Info Sheet and Docketing Statement due 7 days after NOA)	No: (Docketing Statement and Transcript Info Sheet, due 7 days after NOA)	No: (Transcript Info Sheet and Docketing Statement due 7 days after NOA)	"Notice of appearance" (7 days after appearance)	No: (Clerk may only dismiss routine or ministerial appeals; all substantive motions referred to merits panels)
EIGHTH CIR. (www.ca8.uscourts.gov) (314-244-2400)	No: (Form A or B due 3 days after appeal is docketed, transcript form due 14 days *after* appeal is docketed)	No: (Form A or B due 3 days after appeal is docketed; transcript cert 14 days *after* appeal is docketed)	No: (Information sheet and transcript sent to pro se appellant *after* appeal is filed)	Notice of appearance (additional documents depends on scheduling order)	No: (Show cause order is issued as to why case should not be dismissed; only Clerk of Court may dismiss appeal for failure to prosecute)
NINTH CIR. (www.ca9.uscourts.gov) (415-355-8000)	No: (Transcript Cert. due 10 days *after* appeal is docketed; Issue Statement for Mediation)	No: (Transcript Form due 10 days *after* appeal is docketed)	No: (Transcript is optional after appeal is docketed)	"Notice of Appearance" (due 10 days *after* appearance)	No: (Clerk may only dismiss routine, procedural, or uncontested appeals)

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U.S. Circuit Court	Predocketing Forms Other Than NOA?	Counsel File Predocketing Forms?	Pro Se File Predocketing Forms?	Requirements to transfer pro se-to-counseled appeal?	Dismissal by Deputy Clerk?
TENTH CIR. **(www.ca10.uscourts.gov)** **(303-335-2729)**	No: (Transcript Form due *after* appeal is docketed)	No: (Transcript 10 days *after* appeal docketed)	No: Transcript (optional)	"Entry of Appearance" (transcript optional after appearance)	No: (Clerk may only dismiss routine, procedural, or uncontested appeals)
ELEVENTH CIR. **(www.ca11.uscourts.gov)** **(404-335-6100)**	No: (Civil Appeals Statement and Transcript 14 days *after* appeal is docketed)	No: (Civil Appeals Statement and Transcript 14 days *after* appeal filed)	No: (Transcript optional)	"Notice of appearance" (Transcript is optional)	No: (Notice required before any appeal can be dismissed, only Clerk of Court can dismiss for failure to prosecute)
DC COURT OF APPEALS **(cadc.uscourts.gov)** **(202-216-7000)**	No: (Statement and Transcript not part of docketing process)	No: (Statement/ Transcript not part of docketing process)	No: (Statement/ Transcript not part of docketing process)	"Notice of appearance"	No: (Clerk may only dismiss routine, procedural, or uncontested appeals)